No. 14,653

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF FAIRBANKS, a corporation,
Appellant,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE BOUSSARD,
Appellees.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

I.

STATEMENT AS TO JURISDICTION.

The jurisdiction of this Court of Appeals is provided by Title 28, USCA, Section 1291, reading in part as follows: "The courts of appeals shall have jurisdiction over appeals from all final decisions of the District Courts of the United States, and the District Court of the Territory of Alaska * * * except where a direct review may be had in the Supreme Court."

Under the provisions of this Act, appeals from reviewable decisions of the District Court for the Dis-

trict of Alaska, or any division thereof, are made to the Court of Appeals for the Ninth Circuit, Title 28, USCA, Section 1294, paragraph 2.

The decision here appealed from is a final decision for the reason that it was the order denying the plaintiff's motion for new trial which made final the judgment of the District Court of the Fourth Judicial Division, District of Alaska, entered in this cause on the 24th day of August, 1954. (TR 70-73.)

II.

STATEMENT OF CASE.

On April 23, 1952, the appellant Bank of Fairbanks, an Alaskan Banking Corporation, filed a Complaint in the court below (The District Court for the District of Alaska, Fourth Division) in which appellant prayed for personal judgment against the appellees A. L. Kaye and Jean Kaye in the amount of the unpaid principal and interest accrued on four promissory notes, for foreclosure of four different mortgages on the same parcel of property, each of which said mortgages secured one of the aforesaid notes. (Appellant's Complaint, TR pp. 3-37.)

The appellee Josephine Boussard was joined in said Complaint as a party upon the theory that she claimed some interest in the property sought to be foreclosed which interest was "subsequent to and subject to the lien" of the appellant's several mortgages. (Paragraph VII of each of the four causes of action contained in said Complaint, TR pp. 6, 10, 13 and 17.)

Separate answers were filed by the appellees Kaye and the Appellee Boussard. The appellees Kaye admitted that they made and delivered each of the said promissory notes to the appellant as payee, that they executed and delivered to the appellant, as mortgagee, each of the several mortgages securing said notes, that appellant was the lawful owner and holder of each of said notes, and that there was due and owing on each of said notes the amounts of principal and interest alleged to be due appellant. (Paragraphs I, II, III, IV and VI of each of appellant's four causes of action as stated in said Complaint, TR pp. 3-6, pp. 7-9, pp. 10-13, pp. 14-16 and Paragraph I of the appellees Kayes' Answer thereto, TR 50.)

Other than the amounts due and owing on each of said notes which were denied for lack of information, the appellee Boussard made the same admissions in her answer as the appellees Kaye. Appellee Boussard also admitted allegations contained in Paragraph VII of each of appellant's four causes of action. (Paragraphs I, II and IV of the answer of the appellee Boussard, TR 38.)

It was alleged by both the appellees Kaye and the appellee Boussard and admitted by the appellant that on October 9, 1951, the appellee Boussard, as Buyer, entered into a Contract of Purchase and Sale with the appellees Kaye as Sellers in which she, Boussard, agreed to buy and the appellees Kaye agreed to sell the very property encumbered by the aforesaid mortgages. (Paragraph I of appellee Boussard's First Affirmative Defense, TR pp. 38, 39 and Paragraph I of the appellees Kayes' Affirmative Defense, TR 51.)

It was further alleged by both the appellees Kaye and the appellee Boussard and admitted by the appellant that said Contract of Purchase and Sale, together with a Warranty Deed to be delivered to the appellee Boussard upon payment in full of the purchase price, was delivered in escrow to the appellant bank, together with instructions to the appellant to apply the payments made on said Contract towards payment of said notes and mortgages. (Paragraph III of the appellee Boussard's First Affirmative Defense, TR 39 and Paragraph I of the appellees Kayes' Affirmative Defense, TR 51.)

In Paragraph II of the appellees Kayes' Affirmative Defense (TR pp. 51, 52) it was alleged "and it was also agreed by and between the plaintiff and defendants that the said notes and mortgages referred to in the four causes of action contained in plaintiff's Complaint would be extended and that the said plaintiff would accept the monthly payments of $200.00 per month, together with the interest due thereon, as payments upon said mortgages and that no further payments would be required to be made by the said defendant or any of them. That it was with this understanding and agreement between the plaintiff and the defendants that the defendants, A. L. Kaye and Jean Kaye, agreed to sell said property to the defendant, Josephine Boussard. That plaintiff accepted said payments and the said defendant, Josephine Boussard, has continued to make said payments each month to the said bank to apply upon said mortgages as agreed by all of the said parties to this

action and the said bank has accepted the same and applied them upon said notes and mortgages in part payment thereof."

Paragraph III of said Affirmative Defense (TR 52) reads in full as follows: "That the said defendants, A. L. Kaye and Jean Kaye, relying upon the promises of the said plaintiff to extend said notes and mortgages and to accept said payments as in said contract provided agreed to sell said property to the said Josephine Boussard and the said plaintiff has waived its right of foreclosure of said mortgages and should be estopped from claiming that it has a right to foreclose said mortgages and sell said property as prayed for in said Complaint on file herein."

Paragraph V of the appellee Boussard's First Affirmative Defense (TR 40) reads in full as follows: "That this defendant fully relying upon the promises and representations made to her and to her agent, by plaintiff's officers, that plaintiff would accept payments to discharge the mortgages set out in plaintiff's Complaint, according to the terms and in the manner as set out in Exhibit "1", she proceeded in good faith to sign said contract and thereafter made payments to plaintiff as aforementioned. That by reason of plaintiff's promises, representations and receipt of payments and interest under said contract, and applying such payments to the said mortgage indebtedness, and in consideration of the mutual agreements, express and implied, of this defendant assuming, taking over and paying off the defendants Kayes' said mortgages, plaintiff has waived its right

of foreclosure on said mortgages and has extended the time for payment thereof and is estopped, being lawfully bound to accept payment of said mortgage indebtedness according to the terms of said Exhibit "1", and this defendant will be subject to irreparable damage if the prayer to plaintiff's Complaint be granted."

It was upon a denial of the allegations of waiver and estoppel that issues were drawn and a trial had in the Court below on the 16th day of August, 1954, and continuing through the 18th day of August, 1954.

At the conclusion of all the evidence and on the 23rd day of August, 1954, the Court below entered its Findings of Fact and Conclusions of Law (TR pp. 56-66) and, on the 24th day of August its Judgment (TR pp. 67, 68) in favor of all of the appellees and against appellant.

On September 2, 1954, appellant filed a Motion for New Trial (TR 69) which was denied by the Court by minute order on the 7th day of December, 1954 (TR 70), and by formal order on December 16, 1954. From the Judgment and the order denying a new trial, appellant appealed to this Court on the 15th day of December, 1954. (TR 70.)

III.

ARGUMENT.

A.

THE FIRST POINT UPON WHICH APPELLANT RELIES ON THIS APPEAL IS THAT THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL. (Point No. I, appellant's Statement of Points, TR 245.)

The first ground of said Motion was that the Findings of Fact and Conclusions of Law and the Judgment were contrary to the evidence. (TR 69.)

First, as to the Findings of Fact, the Court found that "Prior to the 19th day of October, 1951, the day and date upon which the Defendants and each of them executed the contract of purchase and sale to which reference is hereinabove made an agent of the Defendants Kaye discussed the terms and execution of said contract of sale with the Vice President of the Bank of Fairbanks and did make a full, fair and complete disclosure of all of the terms, conditions, covenants and provisions said Vice President did consent." (XIV TR 62.)

This finding is entirely predicated upon the testimony of one Lazar Dworkin upon direct examination (TR pp. 224-227) which, in view of its brevity, is set out herein, in full, as follows:

"Q. (By Mr. McNabb): State your name, please.

A. Lazar Dworkin, 225 Wendell Street.

Q. Mr. Dworkin, how long have you resided in Alaska, Fairbanks, Alaska?

A. Since May, 1947.

Q. You are, I believe, familiar with a real estate contract concerning some property, real and personal property being the property of Leo and Jean Kaye and upon which the Bank of Fairbanks held four notes?

A. I am.

Q. Were you at any time appointed as an agent to secure a purchaser of that property by Mr. Kaye?

Mr. Johnson: We object to that as being merely a conclusion, if the court please, and no proper foundation laid. He can't make himself an agent by his own testimony.

The Court: Objection will be sustained.

Q. (By Mr. McNabb): Did you at any time have any conversation with Mr. (164) Bailey of the Bank of Fairbanks concerning the sale by Mr. Kaye of his interest in the property upon which the bank had mortgages?

A. I did.

Q. Do you recall the month during which you had such a conversation with Mr. Bailey?

A. Sometime during October, 1951.

Mr. Johnson: Well, if the court please, that is calling for a conclusion which the witness isn't qualified to make. We object to it. I think he can relate any conversation or the substance of them, but the purpose is certainly a conclusion.

The Court: I take it this is to show the interest of Mr. Bailey, the witness, in the property.

Mr. McNabb: Not at all, sir, not the interest of Mr. Bailey, but the, it was, I am not going to testify in reference to this matter. If the court chooses to sustain the objection I will rephrase the question, your Honor.

The Court: Well, I will sustain the objection.

Q. (By Mr. McNabb): What was said during that conversation between you and Mr. Bailey in reference to the property of Mr. Kaye?

A. I advised Mr. Bailey in the early part of October 1951 that I had a proposed purchaser for the property and I (165) wished to see the amount of the indebtedness that was due against the property. He took out a number of notes and mortgages aggregating approximately fifteen thousand dollars, *all of which were due and overdue* and I told him that in order to make the transaction, unless they agreed to take a stipulated amount every month no purchaser could risk going in there and the possibility of being foreclosed. And I told him I had a definite purchaser who would be willing to pay two hundred a month, plus interest. He told me no, *it really wasn't sufficient, he wasn't satisfied with it.* Then he said, who was the purchaser and I gave him the name of the proposed purchaser, Miss Boussard. He said he knew her, said he would like to talk to her. I called Miss Boussard, told her to go see 'Miss Boussard', which she did. *He turned her down.* He called me up and told me he wasn't satisfied with the amount of the payments, so I called him again the latter part of October and went to great length and he told me, well, it looks like these notes have defaulted. *I think we will go along* provided you designate the Bank of Fairbanks as the escrow agent and number two, that the payment be made directly to the bank for the amount equivalent of the unpaid indebtedness. He called Mr. Hurley while I was there and furnished him all the figures in the respective

amounts. Mr. Hurley was to draft the papers. Mr. Hurley was indisposed about ten or twelve days, so I secured the papers and took them to Mr. Rivers and Mr. Rivers drew up all the papers. (166)

Q. After the papers were prepared and executed who placed them in escrow, if you know?

A. After the papers were all executed I took them in to the bank. I took them to the escrow window, I believe it was Phyllis Gidden, and said you had better call Mr. Bailey over to the window, this is one of his transactions. He walked over to the escrow window, examined the contract and papers and said, call Miss Boussard and let her pick up the escrow book.

Mr. McNabb: You may take the witness." (Emphasis supplied.)

Where, within that testimony, can be found a "full, fair and complete disclosure of all the terms, conditions, covenants and provisions to be in said contract contained * * *"? All that appears to have been discussed was the amount of the monthly payments. Certainly nothing was said about the total purchase price or the amount of the down payment nor with reference to insurance or grace. In this connection, the purchase price stated in the contract subsequently placed in escrow was $27,500.00 (Exhibit "1" to Appellee Boussard's Answer, TR 42-48) and recited a down payment of $1,000.00. (TR 43). Yet Paragraph II of the First Affirmative Defense of the appellee Boussard (TR 39) recites that the purchase price was "the sum of $31,500.00, of which sum $4,000.00" was not set out in said contract. Whether the motives for

such concealment pertained to the tax affairs of the appellees Kaye or to the matter of the appellant Bank's mortgages does not appear. Appellant held four installment notes which were fully due and payable without invoking the acceleration clause contained in these notes. Is it reasonable to suppose that appellant would accept two hundred dollars a month together with interest on a liquidated indebtedness of $15,000.00 in lieu of foreclosure on a $31,500.00 property? Surely, under such circumstances, the appellant would want, and should have been entitled to, the moneys which were paid under the table. Yet the Court found erroneously, it is submitted, that the appellant was fully advised of the terms and conditions of the proposed sale prior to the execution of the formal contract documents and "did consent" thereto.

Interestingly enough, although the appellee Boussard was present at the trial of the cause (recitals to Findings of Fact and Conclusions of Law, TR 56), she failed to testify at all in her defense.

The foregoing argument is also applicable to the Trial Court's Finding of Fact No. XV (TR 62-63) insofar as there is any suggestion of an "assent" or "consent" to the contract placed in escrow.

B.

CONCLUSIONS OF LAW CONTRARY TO EVIDENCE.

1. Novation.

As a part of the first ground for its motion for a new trial, appellant maintained that the Conclusions of Law were contrary to the evidence.

Conclusion of Law No. 1 reads in full as follows: "The Plaintiff Bank of Fairbanks did waive its privilege to declare the promissory notes of the Defendants A. L. Kaye and Jean Kaye to be in default by its ratification of the provisions of the contract of purchase and sale, the subject of escrow No. 691, which said ratification and the acceptance of the payments by said Plaintiff Bank and the application of the proceeds thereof from and after the 9th day of November, 1951, did constitute a novation precluding the foreclosure of the mortgages held by the Bank securing the promissory notes of Defendants A. L. Kaye and Jean Kaye." (TR 65-66.)

A novation necessarily contemplates the extinguishment of an existing obligation and the substitution therefor of a new obligation with a new obligor. (39 *Am. Jur.* 258, Sec. 11.)

Moreover, "a mere modification of it (pre-existing obligation) will not do; anything remaining of the original obligation prevents novation." (39 *Am. Jur.* 269, Sec. 24.)

Apparently the Trial Court was of the opinion that the said Contract of Purchase and Sale and the acceptance of same into escrow by the appellant Bank operated to extinguish the mortgages and to substitute the contract purchaser, the appellee Boussard, for the note and mortgage obligors, the appellees Kaye. Only upon this theory could the Trial Court fail to give the appellant Bank relief by *in personam* judgment against the appellees Kaye which was prayed for.

In so holding, the Trial Court must have completely ignored the express terms of the Contract of Purchase and Sale as well as the admissions contained in the Answers of the Appellee Boussard and of the appellees Kaye.

Aside from the fact that the appellant Bank is not a party to the "substituted" obligation, the Contract of Purchase and Sale expressly recognizes the continued existence of the mortgage as valid obligations by the following recitation: "Whereas, Sellers own the real property hereinafter described and Buyer has agreed to purchase same on the terms and conditions hereinafter set forth, notwithstanding the fact that said property is subject to mortgages in favor of the Bank of Fairbanks securing four promissory notes, payable to said bank for an aggregate sum of Fifteen Thousand Dollars ($15,000.00), with interest from October 1, 1951, at Eight Percent (8%) per annum, it being understood and agreed that payments made under this contract will be applied to the satisfaction of said notes and mortgages prior to delivery of deed hereunder." (TR 43.)

Also, the appellees Kaye claimed only a waiver or estoppel to foreclose said mortgages and did not maintain that there was any extinguishment thereof. (Paragraph III, Affirmative Defense of appellees Kaye, TR 52.) Furthermore, the Answer of the appellee Boussard admits that her lien as contract purchaser is subordinate to the lien of said mortgages (appellee Boussard's admission of Paragraph VII of each of appellant's four causes of action—Paragraph IV of appellee Boussard's Answer, TR 38).

2. Waiver.

Conclusion of Law No. 1, above set out, suggests that there was a waiver of the appellant's right to foreclose its mortgages. An express waiver is, of course, the voluntary or intentional relinquishment of a known right. (56 *Am. Jur.,* Sec. 12, P. 113) and must be supported by a valuable consideration. (56 *Am. Jur.,* Sec. 16, P. 114.)

With reference to the latter factor, that of consideration, each of the notes secured by the subject mortgages were due and owing and payable in full. It is fundamental law that a promise to pay a past due indebtedness does not constitute a valuable consideration for the relinquishment of a right.

In *Stoneman Co. v. Briggs* (1933) 110 Fla., 104, 148 So. 556, it was held that an agreement on the part of a mortgagee to refrain from foreclosing his mortgage, and to waive all defaults so long as it received the rents, until the local real estate market should be on a sound financial basis, was no defense to foreclosure of the mortgage, since it lacked consideration and was indefinite as to time for performance.

In *Portland Mortgage Co. v. Horenstein* (1939) 162 Or. 243, 91 P. 2d 533, it was held that a mortgagee did not waive his right to foreclose the mortgage by making an agreement to extend the mortgage after it had already become due, if such extension agreement was not supported by a valid consideration. 148 *A.L.R.* 691.

Promises to forbear have been held to be ineffective where the only consideration was a payment of, or

a promise to pay, a part of that which the mortgagor was already bound to pay. *Jackson v. Fuller* (1936) 66 App. D.C. 239, 85 F. 2d 816 (Writ of Certiorari denied in (1936) 299 U.S. 608, 81 Fed. 448, 57 S. Ct. 236); *Brinson v. Herlong* (1935) 121 Fla. 505, 164 So. 137; *Byrd v. Equitable Life Assurance Soc.* (1938) 185 Ga. 628, 196 S.E. 63; *Brown v. Loewenback* (1935) 217 Wis. 379, 258 N.W. 379.

Thus, a mortgagee's promise not to foreclose based upon the mortgagor's promise to make payment on interest and taxes smaller than those provided in the mortgage was held in *Jackson v. Fuller,* supra, to be invalid for lack of consideration.

In *Brinson v. Herlong* (1935) 121 Fla. 505, 164 So. 137, it was held that where the only consideration for an extension agreement was the mortgagor's payment, after the due date of the obligation of the interest then due and a small amount of the principal, the agreement would not be binding on the mortgagee as there would be no valuable consideration for it, since the payment made was only a portion of that which the mortgagor was bound to pay in any event.

Likewise, a mortgagee's agreement, made when the mortgagor was in default to accept at stated times payment on account of past due interest was held in *Byrd v. Equitable Life Assur. Soc.* (1938) 185 Ga. 628, 196 S.E. 63, not to waive the right to insist on immediate payment or to foreclose the security, where such agreement was not a contract based on any consideration but was a mere indulgence by the

creditor and a mere act of grace on his part. 148 *A.L.R.* 692.

With reference to the first factor, there is no evidence of voluntary or intentional waiver. True, the vice president of the appellant Bank examined the contract of purchase and sale when it was placed in escrow (TR 227), but as previously noted the contract was expressly subject to the mortgages and was entered into "notwithstanding" the existence thereof. The examinaiton of the contract by said vice president and his purported statement to the alleged agent of the sellers: "I think we will go along" (TR 226) with the escrow, falls far short of the expression of any voluntary intention to forego the right of foreclosure, supported by any consideration, valid or otherwise.

Furthermore, a voluntary waiver cannot exist in vacuum. It is in the nature of a contract and presupposes the communication thereof to the persons to be benefited; yet there is a total lack of evidence that the alleged agent of the mortgagors ever told the mortgagors or the proposed buyer of his conversation with the vice president of the appellant Bank upon which turns the entire case of the appellees. The contract of sale was in fact executed by the parties before it was ever examined by an agent of the appellant and recites that $1,000.00 had already been paid thereon.

The appellee Boussard was present at the trial but did not testify at all and the only other testimony adduced by the appellees, that of the appellee A. L.

Kaye, was to the effect only, that he had made no payment to appellant Bank on said notes and mortgages since the execution of the said contract of purchase and sale. (TR 229.)

In view of the fact that there was no evidence of reliance by any of the appellees upon any statements made to the alleged agent of the appellees Kaye, no waiver could be implied.

> "A waiver is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble or expense thereby." (*Astrich v. German-American Ins. Co.,* 131 F. 13; *Black's Law Dictionary,* Third Edition, p. 1827.)

The doctrine of estoppel also must fall with the same lack of evidence of reliance by the appellees on any conduct or statement by any agent of the appellant Bank in inducing the execution of the contract of purchase and sale between the appellees Kaye and the appellee Boussard.

3. Judgment contrary to evidence.

As a part of the first ground for its motion for a new trial, appellant maintained that the judgment was contrary to the evidence. The same arguments

as have been stated above under the first assignment of error are equally applicable here and therefore will not be repeated.

In addition to those arguments, it must be noted that the pleadings on file in the Court below and the evidence adduced at the trial show that there was no dispute between the appellant Bank and the appellees Kaye as to the indebtedness due on the notes sued on. Regardless, then, whether or not the appellant Bank had waived any right to foreclose its several mortgages, certainly the Bank was entitled to a judgment *in personam* as prayed for against the appellees Kaye from the said indebtedness. If, indeed, it were conceded, for purposes of argument only, that under the circumstances the equity of the appellee Boussard should be protected, execution of said judgment against the subject property would necessarily be subject to that equity. The concurrent or cumulative remedies rule applies. (18 *Am. Jur.* 136, Sec. 13.)

C.

SECOND POINT RELIED ON.

The second statement in the statement of points relied on in this appeal, reads in full as follows: "That the judgment of the Trial Court is contrary to the law and the evidence. Said judgment appears at pages 78 to 79 of the original certified record." (The judgment appears at page 67 of the transcript of record herein.) The argument in support of the

second point relied upon on this appeal is the same as that above made with reference to the first point relied upon and therefore will not be repeated herein.

D.

THIRD POINT RELIED ON.

The third point upon which appellant relies on this appeal is stated in full as follows: "That the Trial Court erred in making the following numbered Findings of Fact: XIV, XV, XVIII and XIX in that such findings are contrary to the evidence. The Findings of Fact appear in the original certified record at Pages 68 to 72." (The Findings of Fact appear at pages 56 to 65 of the Transcript of Record herein.) Error with reference to Findings XVIII and XIX is hereby waived. Error with reference to Findings XIV and XV have heretofore been discussed and will not be repeated herein.

E.

FOURTH POINT RELIED ON.

The fourth point relied upon on this appeal reads in full as follows: "That the Trial Court erred in its Conclusions of Law in that the same are not based upon, nor do they follow from the Findings of Fact, and in that the same are contrary to the evidence adduced at the trial. Said Conclusions of Law appear at pages 76 and 77 of the original certi-

fied record." (The Conclusions of Law appear at pages 65 and 66 of the Transcript of Record herein.) Other than the arguments as hereinabove stated, under the first point relied upon on this appeal, the only additional comment required may be briefly stated as follows:

That the only finding of fact upon which the trial Court could base its judgment and its conclusions of law that a waiver or novation had been effected, would be set out in its findings numbered XIV and XV. (Tr. 62 and 63.) Assuming, for the purposes of argument only, that these findings are correct and have some basis in the evidence, they still do not justify nor support a conclusion that a novation or waiver was present. From the fact alone that a discussion was had between the alleged agent of the appellees Kaye and the vice-president of the appellant Bank of Fairbanks in which the proposed contract was discussed in detail and the further fact that the contract was placed in escrow and that the vice-president of said appellant Bank assented to its terms and conditions, no novation could result as has been previously pointed out since there was no extinguishment of the obligation of the mortgagors or any substitution of obligors. Further, as has been previously pointed out, no waiver or estoppel could be found by the Court as a conclusion of law to exist without a further finding of fact that the conversation of the vice-president of the appellant Bank with the alleged agent of appellees Kaye had been communicated to the appellees Kaye and the appellee Bous-

sard prior to their execution of the contract of purchase and sale and that they had in fact relied upon that conversation in their execution of said contract of purchase and sale.

CONCLUSION.

In conclusion, for the reasons hereinabove stated that there existed no novation, waiver—express or implied, or estoppel which would preclude the appellant Bank from foreclosing its several mortgages, or which would preclude a personal judgment against the appellees Kaye, it is respectfully submitted that the judgment of the trial Court be reversed and this cause remanded to the Court below with instructions to order a new trial.

Dated, Fairbanks, Alaska,
May 19, 1955.

Respectfully submitted,
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